SUPREME COURT, U. S.

JUN 23 1967

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In the

Supreme Court of the United States

October Term, 1966.

No. [redacted] 199

MARGUERITE LOVELETT NOWELL,

Petitioner,

v.

AMES NOWELL,

Respondent.

BRIEF IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI

HARRIS, ANDERSON, HENLEY & SHIELDS,
601 Corrigan Tower,
Dallas, Texas,
Counsel for Respondent.

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In the

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October Term, 1966.

No. 1430

MARGUERITE LOVELETT NOWELL,

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v.

AMES NOWELL,

Respondent.

BRIEF IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI

Respondent prays that the petition for a writ of certiorari to review the judgment of the Court of Civil Appeals for the Fifth Supreme Judicial District of Texas at Dallas rendered between the above parties on October 28th, 1966, be denied in all respects.

The record on which said judgment is based does not contain any ground whatever for the issuance of a writ of certiorari to review the judgment and refutes the contentions made in the petition for such writ.

Since the petition fails to state the material facts as required by Rule 23, 1 (e), of the Rules of this Court, Respondent calls to the attention of the Court the following facts, omitted from the petition, which are determinative.

STATEMENT OF CONTROLLING FACTS

(1) The original petition for divorce of Respondent Ames Nowell, which was filed in the Domestic Relations Court of Dallas County, Texas, on March 15, 1965, sought merely a judgment of divorce, made no claim for a personal judgment of any kind and alleged that the defendant (Petitioner herein) was a resident of Darien, Connecticut (see "Plaintiff's Original Petition").

(2) Although the motions and pleas filed by the Petitioner herein in response to said petition for a divorce contained an assertion of absence of jurisdiction over her person, this claim was not pursued and the assertion of same was not the purpose or object of the motions and pleas.

(3) Said motions and pleas consisted of attacks upon the Respondent's allegation in his petition for divorce of having been a resident of Texas for twelve months, attacks upon the jurisdiction of the court over the subject matter of the action, and contentions based upon ex parte injunctive orders of the Connecticut courts, and the purpose of said motions and pleas was to raise issues regarding Respondent's residence, jurisdiction over the subject matter, and said ex parte injunctive orders (see "Defendant's Sworn Motion Challenging Jurisdiction of the Court over Her Person in Temporary Injunction Proceedings", filed September 16, 1965; "Defendant's Sworn Motion Challenging Jurisdiction of the Court Over Her Person", filed September 24, 1965; "Statement of Facts" of hearing on October 22nd, 1965; Defendant's "Plea in Abatement", filed October 25th, 1965; "Defendant's First Amended

Plea in Abatement", filed December 8, 1965; and "Defendant's Brief in Support of Plea in Abatement", filed December 9, 1965).

(4) Petitioner filed in said Domestic Relations Court, in response to Respondent's said original petition for divorce, an answer denying all of the material allegations contained in such petition and demanding strict proof thereof and praying that the suit be dismissed (see "Defendant's Original Answer", filed October 25th, 1965).

(5) Petitioner filed in said Domestic Relations Court, in response to said original petition for divorce, an amended answer denying all of the material allegations contained in such petition and demanding strict proof thereof, pleading the defense of recrimination, alleging that a pre-nuptial property agreement executed by the parties was invalid, alleging that the parties had accumulated community property, demanding that Respondent be required to file a sworn inventory of the assets and liabilities of the parties, alleging that the Petitioner had retained counsel to appear for her in the action, and praying that the pre-nuptial agreement be declared null and void, that Respondent be required to file an inventory and appraisement of the community property, and that Respondent be required to pay to the Petitioner a reasonable fee for her attorneys (see "Defendant's First Amended Original Answer", filed December 8, 1965).

(6) Petitioner filed in said Domestic Relations Court, in response to "Plaintiff's First Amended Original Petition" for

divorce, a second amended answer denying all of the material allegations of said amended petition and demanding strict proof thereof, alleging that a pre-nuptial property agreement executed by the parties was invalid, denying that the Respondent had listed all community property of the parties, alleging the defenses of recrimination and condonation, and praying that said pre-nuptial agreement be declared null and void, that all community property of the parties be set aside for the sole benefit of the Petitioner, and that the Respondent be required to pay to the Petitioner reasonable attorneys' fees for the services of her attorneys in the action (see "Defendant's Second Amended Original Answer", filed December 14, 1965).

(7) Petitioner demanded a trial by jury of the issues raised by said pleadings and, pursuant to said demand, a jury was duly called for such trial.

(8) Petitioner voluntarily appeared by counsel and in person at the trial of said action for divorce in said Domestic Relations Court on December 15, 16, 17 and 18, 1965, testified at length on the issues at the trial before the court and jury, called witnesses who testified on Petitioner's behalf at the trial, and contested the issues throughout the trial to the entry of the judgment (see transcript of proceedings at said trial).

(9) At said trial the Petitioner stipulated and consented that the issues relating to the pre-nuptial property agreement

and the property rights of the parties be determined by the court and not be submitted to the jury, and the court, after considering the pleadings and evidence and in reliance upon the stipulation and consent of the parties, adjudicated such issues, and the attorneys for Petitioner approved the judgment as to form by subscribing their names thereto (see "Judgment", signed and entered December 22, 1965, pages four, eight and nine).

(10) Petitioner did not at said trial or in her motions for a new trial object or contend that the court lacked jurisdiction to adjudicate regarding said pre-nuptial agreement and property rights by reason of lack of jurisdiction over the person of Petitioner, and the Petitioner did not object or contend that such adjudication would constitute, or constituted, a denial of due process of law under the Constitution of the United States.

(11) Said Domestic Relations Court concluded and held that the Petitioner's participation in, and resistance to, said action for divorce constituted a general appearance and submission to the jurisdiction of the court (see "Judgment", signed and entered December 22, 1965, pages one, two, three and four).

(12) Petitioner did not in the Court of Civil Appeals urge or brief, as a ground for reversal, the formal assertion of lack of jurisdiction over her person, and the Petitioner did not assert, urge or brief in that court any claim that the ad-

judication of property rights by the trial court violated due process of law under the Constitution of the United States (see "Appellant's Brief" in Court of Civil Appeals).

(13) The injunctive order of the Connecticut court of September 9, 1965, was issued ex parte, without notice to Respondent and without a hearing of any kind. The order was based upon a petition which implied that Respondent was a resident of Connecticut whereas prior thereto he had ceased to live or reside in Connecticut and had become a resident of Texas. It was hurriedly obtained in the afternoon of the day on which the Petitioner was served with an order of the Texas court enjoining her from interfering with the jurisdiction of the latter court in the divorce action. (See opinion of Court of Civil Appeals, pages 3, 7).

(14) Said injunctive order of the Connecticut court was a temporary order which did not purport to determine or adjudicate any aspect of the merits of litigation between the parties. No hearing was ever held before the Connecticut court to determine whether Respondent was a resident of that state when the order was issued. No other hearing was held on the order, except a motion was made under a special appearance to erase the order on the ground the court lacked jurisdiction to issue the same, and Respondent's application to the Supreme Court of Connecticut for a review of the order denying the motion was dismissed on the ground the order was not appealable.

NO FEDERAL QUESTION IS PRESENTED

No Federal question of due process of law is presented because the Petitioner voluntarily appeared in the action for the purpose of contesting Respondent's allegations of grounds of divorce as well as his allegation of residence in Texas, stipulated and consented that the trial court adjudicate the issues relating to the property rights of the parties, and did not in the trial court or in the appellate court of Texas argue or brief any claim of denial of due process of law under the Constitution of the United States.

Moreover, no Federal question of due process of law is presented because any question as to whether Petitioner's participation in the litigation of the action constituted a general appearance and submission to the jurisdiction of the Texas courts, or as to whether the Texas trial court acquired jurisdiction over the person of Petitioner, is a question of Texas law which was determinable by the Texas courts.

No Federal question of full faith and credit is presented because the Connecticut injunctive order was not a judgment or adjudication of a sister state entitled to compulsory recognition under Article IV, Section 1, of the Constitution of the United States.

No Federal question of denial of comity is presented because the ruling of the Texas courts with respect to said injunctive order was a discretionary determination which was in no way forbidden by the Constitution of the United States.

ARGUMENT AND AUTHORITIES

The contentions made by the petitioner for the granting of a writ of certiorari are without foundation in fact or in law.

A

No Violation of the Due Process Clauses of the Fifth and Fourteenth Amendments to the Constitution of the United States Occurred or Has Been shown

Since the Respondent's original complaint for divorce alleged that the Petitioner resided in Connecticut and did not demand any personal judgment against her and since process was served upon the Petitioner outside the State of Texas, it was obvious that the Petitioner was not required to appear and participate in the action and that she was free to refrain from such an appearance and participation. *Rice v. Rice*, 336 U.S. 674 (1949).

Instead of remaining out of the case the Petitioner concluded, evidently after careful consideration, to resist the action in every possible way and on all of the issues, including the merits, through the courts of Texas and then to this Court.

Thus, in the trial court the Petitioner attacked the Respondent's allegation of residence in Texas and the court's jurisdiction over him and the subject matter, denied the Respondent's allegations of grounds for divorce and pleaded the defenses of recrimination and condonation, at-

tacked a pre-nupital property agreement between the parties and sought to have it declared invalid, alleged the existence of community property and voluntarily brought the financial relationships of the parties into the case, demanded a trial by jury, appeared and testified at the trial and called witnesses who testified thereat, consented that the issues relating to the pre-nuptial agreement and property rights be determined by the court alone, and approved the form of of the judgment entered after the trial.

It is apparent that the purpose of said participation in the action was to contest all of the issues, including those relating to the merits and property rights, and to prevent the trial court from granting any judgment of divorce whatsoever. By their very nature and number the acts of participation and resistance constituted a general appearance and submission to the jurisdiction of the Court, and the trial court was clearly justified in treating the Petitioner's participation and resistance as a general appearance.

Although in the early stages of the litigation the Petitioner filed motions purporting to challenge the jurisdiction of the court over her person under Rule 120a of the Texas Rules of Civil Procedure, the arguments in support of such motions and pleas consisted of attacks upon the Respondent's allegation of residence in Texas and contentions based on the ex parte Connecticut injunctive orders. Said Rule 120a permits a special appearance only "for the purpose of objecting to the jurisdiction of the court over the person or property of the defendant on the ground that such party or property is not amenable to process issued by the courts

of this State" and specifically provides that, "Every appearance, prior to judgment, not in compliance with this rule is a general appearance." The contentions and acts of the Petitioner clearly went beyond the limited scope of Rule 120a and constituted a general appearance. *Davis v. Davis*, 305 U.S. 32, 42-43 (1938); *York v. Texas*, 137 U.S. 15 (1890); *Henderson v. Henderson*, 247 N.Y. 428, 160 N.E. 775 (1928); 42 Texas Law Review, 279, 312-313, 317-318 (1964).

The respondent originally sued for a divorce only dissolving the marriage of the parties. In such an action jurisdiction over the person and property of the defendant is unnecessary. *Williams v. North Carolina*, 317 U.S. 287 (1942). The trial court was competent to find and did so find that the Respondent fulfilled Texas residence requirements necessary for a judgment of divorce. *Durfee v. Duke*, 375 U.S. 106, 111-112 (1963); *Chicot County Drainage District v. Baxter State Bank*, 308 U.S. 371, 376-378 (1940), *Aucutt v. Aucutt*, 122 Tex. 518, 62 S.W. 2d 77 (1933), 89 A.L.R. 1198. The Connecticut injunctive orders, having been issued in an action for a separation only, were not entitled to recognition in the Texas courts since a separation action is vitally different from an action for divorce. *Pettis v. Pettis*, 91 Conn. 608, 101 Atl. 13 (1917); *Perusse v. Perusse*, 402 S.W. 2d 931 (1966). For these reasons, the trial court correctly overruled Defendant's Motion Challenging Jurisdiction of the Court over Her Person. Thereafter the Petitioner voluntarily appeared and contested the divorce action upon the merits and this conduct constituted a general appearance giving the trial court in personam jurisdiction over the petitioner. *Davis v. Davis*,

305 U.S. 32, 42-43 (1938); *York v. Texas*, 137 U.S. 15 (1890). By the time the trial was concluded the Petitioner had abandoned any pretense of claiming lack of jurisdiction over her person.

Especially significant is the indisputable fact the Petitioner stipulated and consented that the trial court determine the issues relating to the pre-nuptial agreement and the propery rights of the parties, which stipulation and consent is stated in the judgment entered at the conclusion of the trial as follows:

> "Further, came the parties, in person, and by stipulation through their respective attorneys of record, and consented that the Court, based upon the pleadings and the evidence, determine the issues raised by the pleadings regarding the Pre-Nuptial Agreement executed by the parties on or about April 3, 1957, and the respective rights of the parties in and to certain items of property acquired during the course of this marriage, which issues by agreement of the parties and their respective counsel, were not submitted to the jury."

This stipulation and consent, together with the Petitioner's other active participation in the litigation, clearly shows that she voluntarly submitted to the jurisdiction of the court, that the adjudication of the issues relating to the pre-nuptial agreement and property rights was in accord with due process of law, and that Petitioner's claim that the court went beyond the limitations of due process in adjudicating the financial relationships of the parties is without merit in fact or in law.

The adjudication of the merits of the issues relating to the pre-nuptial agreement and property rights of the parties

constituted a finding or conclusion that the Petitioner had appeared generally, which finding the court was empowered to make. *Chicot County Drainage Dist. v. Baxter State Bank*, 308 U.S. 371 (1940); *York v. Texas*, 137 U.S. 15 (1890).

Moreover, at the trial the Petitioner did not question the trial court's jurisdiction to adjudicate the issues relating to the pre-nuptial agreement and property rights of the parties on the ground of lack of jurisdiction over the person of the Petitioner or on any other ground and did not contend that the adjudication of such issues by the trial court would exceed, or exceeded, the limits of due process of law. The failure to raise such objections at the trial precluded the raising of such objections on appeal. 4 C.J.S., *Appeal and Error*, Sec. 228, p. 665.

Although in the appellate court of Texas the Petitioner formally asserted that the trial court erred in overruling her motion challenging the jurisdiction of the court over her person, the Petitioner failed to urge or brief the asserted point and thereby waived the same. 4 Texas Jurisprudence 2d, *Appeal and Error*, Sec. 658, pp. 166-167. The Petitioner did not even assert in said appellate court any claim that the adjudication by the trial court of the property rights of the parties violated due process of law.

The failure of the Petitioner to assert and pursue in the courts of Texas, in accordance with the procedure of that State, the alleged question of due process of law precludes review of the same on certiorari by this Court. *Beck v. Washington*, 369 U.S. 541, 549-554 (1962).

B

No Violation of the Full Faith and Credit Clause Is Presented.

The injunctive order of the Connecticut Court of September 9th, 1965, was admittedly a temporary order which did not purport to adjudicate the merits of any aspect of the Connecticut action between the parties. Such an order is not entitled to full faith and credit. *Swift v. McPherson*, 232 U.S. 5 (1914); 50 C.J.S., Judgments, Sec. 889, pp. 478-479.

The order was issued ex parte, without notice to the Respondent and without a hearing of any kind, and was based on a petition which represented, contrary to fact, that the Respondent was a resident of Connecticut.

The order was not appealable until the entry of a final judgment determining the action. Connecticut Practice Book (1963), Sec. 600; Maltbie, *Connecticut Appellate Procedure* 2d Ed., 1957), Sec. 10, p. 11, Sec. 15, p. 18.

If the order had any effect it applied only to the person of the Respondent and did not operate on the Texas court. *Steelman v. All Continent Co.*, 301 U.S. 278, 291 (1937); *Cunningham v. Cunningham*, 25 Conn. Sup. 221, 200 A. 2d 734 (1964); *Kleinschmidt v. Kleinschmidt*, 343 Ill. App. 539, 99 N.E. 2d 623 (1951).

It is well established that an order enjoining a party from prosecuting an action in another state is not entitled to com-

pulsory recognition in the courts of the latter jurisdiction. *James v. Grand Trunk & Western Ry. Co.*, 14 Ill. 2d 356, 152 N.E. 2d 858 (1958), cert. den. 358 U.S. 915 (1958); *Kepner v. Cleveland, Cincinnati, Chicago & St. Louis Ry. Co.*, 322 Mo. 299, 15 S.W. 2d 825 (1929), cert. den. 280 U.S. 564 (1929); *Frye v. Chicago, Rock Island & Pacific Ry. Co.*, 157 Minn. 52, 195 N.W. 629 (1923), cert. den. 263 U.S. 723 (1923); Restatement, Conflict of Laws, Sec. 450, p. 534; Ehrenzweig, *Conflict of Laws* (1962), Sec. 77, p. 262; 21 C.J.S., *Courts*, Sec. 554, p. 860.

Petitioner's contention that the Connecticut injunctive order was entitled to compulsory recognition in the courts of Texas is entirely without merit and presents no Federal question.

C

No Federal Question of Comity is Presented

The doctrine of comity is correctly defined in the opinion of the Court of Civil Appeals. 408 S.W. 2d 550, at p. 553. Since, as there explained, comity is a matter of courtesy and discretion and not of absolute right, the decision of the Texas trial court to decline comity to the ex parte Connecticut injunctive order and the affirmance of that decision by the Court of Civil Appeals do not raise any Federal question whatever. The decision and the affirmance were based upon a full consideration of the relevant facts and circumstances and the law applicable thereto and clearly are not reviewable by this Court.

CONCLUSION

For the reasons hereinabove stated the petition for a writ of certiorari should be denied in all respects.

Respectfully submitted,

HARRIS, ANDERSON, HENLEY & SHIELDS,

By .....
Lawrence W. Anderson

By .....
Charles O. Shields

Counsel for Respondent.